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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DEVIN FARLEY,

Defendant and Appellant.

A106406

(Solano County
Super. Ct. No. 204022)

Defendant appeals from a judgment following a plea of no contest. His counsel has raised no issues and asks this court for an independent review of the record to determine whether there are any issues that would, if resolved favorably to defendant, result in reversal or modification of the judgment. (*People v. Wende* (1979) 25 Cal.3d 436; see *Smith v. Robbins* (2000) 528 U.S. 259.) We find no arguable issues and, accordingly, affirm the judgment.

A misdemeanor complaint filed on December 4, 2002, charged defendant with violation of Vehicle Code¹ sections 23152, subdivision (a) (driving under the influence of alcohol or drugs) and 23152, subdivision (b) (driving while having a 0.08 percent or higher blood-alcohol level). It was also alleged pursuant to section 23190, subdivision (a)² that defendant suffered a prior conviction for section 23152, subdivision (b) in 2000. The complaint was amended on December 13, 2002 to add an additional prior driving under the influence conviction.

¹ All further statutory references are to the Vehicle Code.

² We note this section was repealed effective July 1, 1999.

On December 17, 2002, defendant entered a plea of no contest to a violation of section 23152, subdivision (b), admitted the two prior convictions and admitted a violation of probation. When the case came up for sentencing, defendant addressed the court questioning why the indicated sentence kept increasing. The court advised defendant that it would let him withdraw his plea if he chose and continued the matter to the following day to allow him to think about withdrawing his plea or accepting the indicated sentence of 2 one-year consecutive sentences. The following day he was permitted to withdraw his plea.

On February 4, 2003, an amended felony complaint was filed charging defendant with felony violations of sections 23152, subdivision (a) and 23152, subdivision (b). Three prior driving-under-the-influence convictions were alleged pursuant to sections 23550 and 23550.5 together with an allegation that defendant had a blood-alcohol level of 0.20 percent and higher within the meaning of section 23578. The amended complaint also contained a misdemeanor allegation that defendant violated section 14601.2, subdivision (a).

The public defender's office declared a conflict and the court appointed the conflict defender's office to represent the defendant. Defendant waived his right to a preliminary hearing on March 25, 2003, and an information was filed on April 1, 2003 which mirrored the allegations in the amended felony complaint. On July 29, 2003, new counsel filed a motion "To Set Aside and Vacate Withdrawal of, and to Reinstate, Plea." The motion was based on the ground that defendant's prior counsel provided ineffective assistance of counsel in advising defendant to withdraw his plea. The motion was heard on September 16, 2003. The court noted that there was "no factual support for some of [the] assertions" and indicated that it would give counsel "some time to see if you can come up with some declarations or something to give me some more facts."

On October 14, 2003, the matter again came up for hearing and the court advised defendant's counsel that a writ procedure should be utilized. At a hearing on November 18, 2003, the court denied the motion to withdraw the plea on the ground that "the procedure is inaccurate or inappropriate for what we are attempting to accomplish"

On February 10, 2004, defendant entered pleas of no contest to section 23152, subdivision (a) and section 14601.2, subdivision (a) as charged in the information and admitted the prior convictions. The court then found that he was in violation of his grant of probation on case C161917 which was one of the prior convictions alleged in the information.

On April 13, 2004, defendant was sentenced to the midterm of two years on the 23152, subdivision (a) count, awarded custody credits of 733 days, and ordered to pay statutory fines. The court ordered the defendant released since his custody credits exceeded the two year sentence.

Since defendant waived a preliminary hearing, the facts giving rise to the amended information are taken from the probation report. On November 16, 2002, defendant's vehicle was observed drifting "back and forth across a roadway edge line" while traveling at 70 miles per hour in a 55-miles-per-hour zone. A traffic stop was made, and the officers noticed a strong odor of alcohol in the vehicle. The defendant had bloodshot and watery eyes and his speech was slow and slurred. He was asked to exit the vehicle and perform field sobriety tests which he failed to perform as instructed. He was arrested and submitted to a breath test. That test revealed a blood-alcohol level of ".21%/.20%."

Defendant was represented by counsel at all critical stages of the proceedings.³ He knowingly, intelligently, and voluntarily waived his constitutional rights when entering his plea and was fully advised of the consequences of his plea. There was no sentencing error.

³ In a petition for writ of habeas corpus (A108902), defendant claims that he received ineffective assistance of counsel on the proceedings below. By separate order filed this date, we have issued an order to show cause returnable to the superior court.

We have reviewed the entire record. There are no arguable issues.
The judgment is affirmed.

Swager, J.

We concur:

Marchiano, P. J.

Margulies, J.